Nos. 01-1707

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WILLAM ASHTON, *et al.*,

Petitioners,

v.

CITY OF MEMPHIS,

Respondent.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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In its opposition ("City Opp.") to the petition ("Pet."), the City of Memphis repeatedly asserts that petitioners were not harmed by the discrimination that undisputedly violated the Constitution because (1) merely being treated unequally is not a harm unless one also would have received a benefit and (2) petitioners would not have received a promotion because they were too far down a promotion list created from an unvalidated procedure. The first proposition is a question of law with which, as we pointed out in our petition, many lower courts disagree.

The second proposition relies entirely upon the unstated assumption that the City would still have used the list created from an invalid procedure (albeit in a race-neutral way) had it not been using "affirmative action." *E.g.*, City Opp. 21 ("If affirmative action had not been applied, only the highest ranking 75 (Ashton/1988) and highest ranking 94 (Aiken/1989) individuals from the composite list would have been considered for promotion and/or ultimately promoted"). As the petition points out, there is not a shred of evidence in the record to support this unstated assumption (and, thus, the City's conclusions). The City does not cite any. There is not a shred of evidence because the lower courts, assuming this question to be one of *standing* (instead of a defense under *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977)), placed the burden on plaintiffs to show that the City *would not* have used the list from the invalid procedure. *Compare Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (Scalia, J.) ("it is unreasonable and destructive of the purposes of Title VII to require the plaintiff to establish in addition the difficult hypothetical proposition that, had there been no discrimination, the employment decision would have been made in his favor"). Thus, the resolution of the standing issue would have an immediate and obvious effect on this case: the order granting defendants' summary judgment motion on standing, submitted without any evidence at all, would be reversed.

The City's other reasons to deny the petition range from the meritless to the misleading.

1. There is a circuit split, and the City cannot really dispute it. It concedes that *Price v. City of Charlotte*, 93 F.3d 1241 (4th Cir. 1996) cannot be reconciled with the Sixth Circuit's approach, and it disagrees with the result. City Opp. 24. It refers to some factor present in the district court opinion in *Price* concerning injunctive relief, and asserts that the court of appeals focused "largely on issues of damages rather than standing." *Id.* But the holding in *Price* is unambiguous: "[Plaintiffs] have *standing* to sue to recover compensatory damages" even though they "would not have been promoted." *Price*, 93 F.3d at 1244 & n.1 (emphasis added).

The City tries to move the Eleventh Circuit's decision in *Wooden v. Bd. of Regents of the University of Georgia*, 247 F.3d 1262 (11th Cir. 2001) to its side of the circuit split ledger, but it does so in an improper and misleading way. The City does not argue that the standard in the Eleventh Circuit is the same as the standard it and the Sixth Circuit espouse. Nor could it. *Compare* City Opp. 15 ("standing for purposes of backward-seeking relief is to be determined by whether the plaintiff *has lost* a benefit *because of* the alleged discriminatory barrier" (emphasis in original)) *with Wooden*, 247 F.3d at 1278 (rejecting university's identical argument that an applicant has standing only if "the candidate could show that he was knocked out because of race").

The City only argues that petitioners in this case would have lacked standing under the City's interpretation of the Eleventh Circuit's standard, as well as the Sixth's. It does this by misrepresenting the facts: it asserts that the promotions in the police department at issue here were pursuant to a two-part process and "all applicants were treated the same, regardless of race" (City Opp. 24) in the "first" part where petitioners were eliminated. The City does not explain this two-part process at all. It cannot be reconciled with any description of the facts in any lower court, none of which referred to a "two-part" process. The primary fact identified by the District Court, which the City does not dispute, is that petitioners here had higher rankings than most

of the African American officers who were promoted. App. 10a-11a. Thus, the City's assertion that "it is undisputed that Petitioners competed on equal footing for all available positions in the promotional process" (City Opp. 18) is outright false; if it were true, petitioners would have been selected before those of a different race with lower composite scores. How can anyone in good conscience assert that race was not a factor under those circumstances?

The City then ignores the decisions from other circuits, the outcomes of which are irreconcilable with the decision here. Pet. 24-25; City Opp. 24. It is true that those cases did not specifically address "standing" (*but see* Pet. 25 n.8). But standing must be considered before the merits (*Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998)), and is part of a Court's Article III subject matter jurisdiction that a Court must consider *sua sponte* even if not raised by the parties or the trial court (*id.* at 93). Thus, those Courts cannot have used the Sixth Circuit's standard for assessing standing; if they did, they would have been obligated to *sua sponte* dismiss the case before reaching the merits.[1]

Finally, the City does not dispute that the Sixth Circuit's approach would raise grave doubts about the

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[1] The City identifies various other lower court cases that arguably agree with the Sixth Circuit's approach. Only one of those cases is from a court of appeals, and the court of appeals in question (the Eighth) has not been terribly consistent on this question. *E.g.*, *Edwards v. Jewish Hospital*, 855 F.2d 1345, 1348 (8th Cir. 1988) (discharged employee can sue for racial discrimination under 42 U.S.C. § 1981 even though he would have been discharged anyway); *Bibbs v. Block*, 778 F.2d 1318, 1323 (8th Cir. 1985) (en banc) (employee denied promotion stated Title VII claim; "A defendant's showing that the plaintiff would not have gotten the job anyway does not extinguish liability").

The City also lengthily discusses another Sixth Circuit case, *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993). City Opp. 15-18. We concede that the lower court decisions in this case are consistent with other Sixth Circuit opinions.

constitutionality of Section 107 of the Civil Rights Act of 1991 (42 U.S.C. § 2000e-5(g)(2)(B)). Pet. 25.

2. The bulk of the City's opposition discusses this Court's cases and tries to distinguish most of those cases from the facts here. City Opp. 8-15, 18-22. There is no case from this Court exactly on point; if there were, we give the courts of appeals enough credit to presume that there would not be a circuit split. Accordingly, it is not necessary to address the City's analysis of those Supreme Court cases, with the exception of the following brief notes.

First, and perhaps most remarkably, the City does not bother even to mention *Carey v. Piphus*, 435 U.S. 247 (1978) despite the fact that it was identified in one of the Questions Presented, discussed at length in the petition, and relied upon by various lower court cases cited in the petition. Petition i, 18-19, 20-21 n.6.

Second, the City tries to distinguish *Heckler v. Mathews*, 465 U.S. 728 (1984), and its discussion of the noneconomic and stigmatizing harms caused by discrimination, by claiming that petitioners here cannot have suffered such harms because they "are not members of a disfavored group stigmatized as innately inferior." City Opp. 10. Mr. Mathews was a male alleging gender discrimination.

Third, the City tries to distinguish the Court's standing holding in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) by asserting that this Court's "inability to compete" ruling came "only after noting the University's concession that it could not prove that Bakke would not have been admitted in the absence of the special program . . ." City Opp. 19. Again, this is quite misleading. The Court's ruling on "inability-to-compete" standing was a separate holding. *Bakke*, 438 U.S. at 280-81 n.14 ("Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing").

Finally, the City discusses *Lesage v. Texas*, 528 U.S. 18 (1999) (City Opp. 20-21) without identifying its most salient characteristic for this case: it never mentions the word "standing." Indeed, unlike "standing" cases, and the decisions of the courts below here, *Lesage* (like *Mt. Healthy*) plainly puts the burden of showing that the same decision would have been made squarely on the government. City Opp. 21 (*quoting Lesage*, 528 U.S. at 21). As the City (perhaps inadvertently) concedes, *Lesage* involves a merits issue. City Opp. 25 (citing *Lesage* as a merits case).

Ultimately, the City's contention is that the inability to compete is an "injury" only in certain kinds of cases. City Opp. 14. The City does not explain why this should be so. An injury is an injury, regardless of the kind of case in which it appears. Stigmatic harms associated with discrimination are either injuries or not. *Curtis v. Loether*, 415 U.S. 189, 195 n.10 (1974) (racial discrimination is a "dignitary tort"). If they are, there just is no good reason to consider them injuries in one set of cases but not another. Or, if there is a good reason, the City has not identified it.

3. The City offers little discussion on the second and third questions posed by the petition. It does not even properly identify the second question, which is this: can a defendant, either on a standing question or in presenting a *Mt. Healthy* defense, say that it would have relied upon a procedure that was itself discriminatory (because it was not job validated)? The City certainly makes no effort to refute the existence of a circuit split on that issue, or the third one.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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